Supreme Court, U.S.
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No. 95-1633

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES FRANCIS LEINENBACH, AKA JAMES NELSON,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it refused to allow certain defense exhibits in the jury room during deliberations.

2. Whether the district court erred in concluding that the quantities of DL-methamphetamine attributed to defendant were properly treated as "methamphetamine" under the 1987 Sentencing Guidelines.

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OPINION BELOW

The order of the court of appeals affirming the district court (Pet. App. 1a-2a) is unpublished, but the decision is noted at 70 F.3d 1258 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on October 27, 1995. A petition for rehearing was denied on December 11, 1995. On February 14, 1996, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 9, 1996, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846; manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1); and possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. 1. He was sentenced to 324 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. Beginning in the fall of 1986, petitioner conspired with William Kelly and others to manufacture methamphetamine. Petitioner agreed to supply Kelly with P2P, a precursor chemical, and Kelly agreed to provide other chemicals and equipment, to find places to manufacture the drug, and to act as the "cook." Gov't C.A. Br. 7. Thereafter, Kelly manufactured methamphetamine on numerous occasions, using P2P supplied by petitioner. In each instance, Kelly used the "P2P-aluminum reduction" method of production. *Id.* at 7-14.

2. On May 28, 1993, petitioner was indicted. The government's evidence at trial included testimony from Kelly and other co-conspirators. Gov't C.A. Br. 4, 6-15; 18-23. In addition, the government introduced a tape-recorded conversation between petitioner and a co-conspirator during which petitioner admitted to his past efforts to manufacture methamphetamine with Kelly. *Id.* at 16-18.

Petitioner attempted to impeach several witnesses by cross-examining them extensively regarding the benefits they received from their cooperation with the

government. Petitioner offered as exhibits copies of the witnesses' indictments and plea agreements and the government's sentencing memoranda. Gov't C.A. Br. 37. Although the court admitted those documents into evidence and allowed petitioner to use them during cross-examination and in his closing argument, it warned petitioner that it might not allow the documents themselves to go to the jury. *Ibid.* After the jury retired to deliberate, the court met with counsel to decide which government exhibits would be sent to the jury room. With only one exception, the defense consented to the jury's use of all of the exhibits proposed by the government. C.A. App. 38-44. Then, although he had previously indicated that he did not intend to send any defense exhibits to the jury, defense counsel proposed that the jury also be given many of the exhibits introduced during his efforts to impeach the government's witnesses. *Id.* at 45-66. The government objected, and the district court concluded that those exhibits should not be sent to the jury. In so ruling, the court noted that the documents contained "all sorts of extraneous material," including "hearsay" and "inadmissible, irrelevant, objectionable material" that had not been presented to the jury. *Id.* at 51, 57, 61. The court also observed that "the defendant has got full advantage of these agreements with these witnesses to attack their credibility * * * and has argued the importance of these matters to the jury." *Id.* at 63. Petitioner did not contest those conclusions, but argued that the exhibits should be sent to the jury because they had been received into evidence. See, *e.g.*, *id.* at 46, 48. On May 16, 1994, the jury found petitioner guilty on all counts.

3. A presentence report (PSR) prepared by the Probation Office concluded that petitioner had been involved in the manufacture of 127 pounds of "cut" methamphetamine. PSR 7. Using the Drug Equivalency Table in Section 2D1.1 of the November 1, 1987, Sentencing Guidelines Manual, the PSR calculated a base offense level of 36.[1] Petitioner objected to the PSR because it used the drug equivalency for "methamphetamine," rather than the lesser drug equivalency for "L-methamphetamine/Levo-methamphetamine/L-Desoxyephedrine" to calculate his base offense level. In response, the government introduced expert testimony at petitioner's sentencing from Jack Fasanello, a senior forensic chemist with the Drug Enforcement Administration (DEA). Mr. Fasanello testified that methamphetamine occurs in two separate optical isomers, L-methamphetamine and D-methamphetamine. Sent. Tr. 25-26; see also *United States* v. *Carroll*, 6 F.3d 735, 743 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994). L-methamphetamine has little physiological effect on the human nervous system, while D-methamphetamine produces the "high" desired by methamphetamine users. Sent. Tr. 38-39; *Carroll*, 6 F.3d at 743. Mr. Fasanello further testified that the "P2P/aluminum reduction reaction" method used by the conspiracy invariably produced "DL-methamphetamine," which consists of 50% D-methamphetamine molecules, and 50% L-methamphetamine molecules. Sent. Tr. 25-26, 36. DL-

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[1] All parties agreed that the 1987 Guidelines were less onerous to petitioner than the Guidelines in effect at the time of sentencing, and that the 1987 Guidelines should be used in sentencing. Pet. 19.

methamphetamine is about 50% as potent as D-methamphetamine. *Id.* at 39.

Based on that testimony, the district court concluded that the methamphetamine produced by petitioner was DL-methamphetamine, not L-methamphetamine. Sent. Tr. 118.[2] The court rejected petitioner's claim that the drug equivalency for L-methamphetamine should be used to calculate his base offense level. Instead, the court calculated that offense level using the drug equivalency for "methamphetamine," which yielded a level of 36, and a Guidelines sentencing range of 324 to 405 months' imprisonment.[3] Petitioner received the lowest possible sentence within the applicable range.

4. On appeal, petitioner argued, *inter alia*, that the trial court erred when it declined to send into the jury room during deliberations certain defense exhibits admitted at trial. Petitioner also argued that the district court erred in concluding that DL-methamphetamine is "methamphetamine" within the meaning of the 1987 Guidelines. The court of appeals affirmed. Pet. App. 1a-2a.

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[2] In reaching that conclusion, the district court also relied on the fact that persons who had tried the drugs testified that they were "good" product, and the fact that knowledgeable customers were willing to buy the drugs. Sent. Tr. 118-119; see Gov't C.A. Br. 42-43.

[3] The district court concluded that petitioner manufactured 90 pounds of cut methamphetamine, and that he was subject to a two level increase in his base offense level under Guidelines § 3B1.1(c) (1987) for his aggravating role in the offense. Sent. Tr. 119-122, 126. Combined with petitioner's criminal history category of IV, those findings yielded a sentencing range of 324-405 months' imprisonment. *Id.* at 128.

ARGUMENT

1. Petitioner renews his claim that the district court erred when it refused to allow certain defense exhibits in the jury room during deliberations. Pet. 8-19. That claim is incorrect. The courts of appeals have uniformly held that "[w]hether * * * evidentiary exhibits properly admitted should or should not accompany the jury to the jury room is a discretionary matter for the trial court." *United States* v. *McCarthy*, 961 F.2d 972, 978 (1st Cir. 1992) (internal quotation marks omitted); see *United States* v. *Ulerio*, 859 F.2d 1144, 1145 (2d Cir. 1988); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 201 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); *United States* v. *Aragon*, 983 F.2d 1306, 1309 (4th Cir. 1993); *United States* v. *Zepeda-Santana*, 569 F.2d 1386, 1391 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Scaife*, 749 F.2d 338, 347 (6th Cir. 1984); *United States* v. *Burrell*, 963 F.2d 976, 982 (7th Cir.), cert. denied, 506 U.S. 928 (1992); *United States* v. *Robinson*, 774 F.2d 261, 275-276 (8th Cir. 1985); *United States* v. *DeCoito*, 764 F.2d 690, 695 (9th Cir. 1985); *United States* v. *De Hernandez*, 745 F.2d 1305, 1308 (10th Cir. 1984); *United States* v. *Sims*, 719 F.2d 375, 379 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984); *Dallago* v. *United States*, 427 F.2d 546, 553 (D.C. Cir. 1969). Accordingly, "[t]he trial court may send all or part of the exhibits admitted into evidence to the jury before or after it has begun its deliberations." *De Hernandez*, 745 F.2d at 1308. The court's determination regarding which exhibits may be considered by the jury during deliberations is reviewed for abuse of discretion. *DeCoito*, 764 F.2d at 695. Thus, contrary

to petitioner's claim, the decision below did not violate any "Circuit-wide presumption" that the jury was "entitled to see" those exhibits simply because they had been admitted into evidence. Pet. 13.[4]

The only question presented here, therefore, is whether the district court abused its discretion. The district court did not abuse its discretion. As the court observed, portions of petitioner's exhibits contained extraneous material, including "hearsay" and "inadmissible, irrelevant, objectionable material." C.A. App. 51, 57, 61. Petitioner now contends that the district court should have given the jury the admittedly inappropriate material, subject only to a limiting instruction. Pet. 14. The court permissibly concluded, however, that a limiting instruction would not have been appropriate here. Such an instruction may be given when evidence is admissible for one purpose (*e.g.*, to show bias) but not another (*e.g.*, to prove guilt). See, *e.g.*, *United States* v. *Werme*, 939 F.2d 108, 113 (3d Cir. 1991), cert. denied, 502 U.S. 1092 (1992); Fed. R. Evid. 105. That was not the case here with respect to the hearsay in petitioner's exhibits, which was not admissible for any purpose. Petitioner's alternative claim that the judge should have

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[4] The cases on which petitioner relies (Pet. 9) for his claim of a "Circuit-wide presumption" do not support that view. In *DeCoito*, 764 F.2d at 695, the Ninth Circuit noted that "[j]urors are generally entitled to examine documents properly admitted in evidence." Immediately thereafter, however, the court observed that "the decision to send such exhibits to the jury room is within the discretion of the trial court." Likewise, in *Dallago*, 427 F.2d at 553, the D.C. Circuit observed that "[the examination of documents admitted into evidence] in the jury room during deliberations is a matter within the sound discretion of the trial court."

attempted to redact all of the inadmissible materials from his exhibits (Pet. 10 n.7) comes too late, because petitioner never proposed that solution at trial. Nor is there merit to petitioner's claim that, having excluded some of his exhibits from the jury room, the trial court should have cautioned the jury not to place "undue emphasis" on the exhibits provided to them. Pet. 16 n.9. While such an instruction may be advisable, see *De Hernandez*, 745 F.2d at 1308, it was not requested here.

Finally, petitioner contends that the district court's rulings constituted an abuse of discretion because the jury was allowed to view more of the prosecution exhibits than the defense exhibits. According to petitioner, that "disparity" runs counter to Seventh Circuit decisions requiring that the district court be "evenhanded" in deciding which exhibits to allow into the jury room. Pet. 14-16 (citing *United States* v. *Medina*, 552 F.2d 181, 191-192 (7th Cir.), cert. denied, 434 U.S. 839 (1977); *United States* v. *Samples*, 713 F.2d 298, 303 (7th Cir. 1983); *United States* v. *Hofer*, 995 F.2d 746, 749 (7th Cir. 1993)). As petitioner notes, the Seventh Circuit has stated that a district court should be "evenhanded" in allowing evidence into the jury room, but it has established no bright line rule as to what constitutes "evenhandedness." In this case, where petitioner *consented* to allowing the jury to view the government's exhibits, and the government properly objected to the viewing of his because they contained "inadmissible, irrelevant, [or] objectionable material," the fact that the jury ultimately saw more of the government's exhibits does not violate any principle of evenhanded-

ness.[5] The judge applied the same rules equally to all parties.

2. Petitioner also contends (Pet. i, 19-30) that this Court should grant certiorari to "clarif[y]" the treatment of DL-methamphetamine under the Sentencing Guidelines.

Petitioner contends that the district court erred in treating the DL-methamphetamine he manufactured as "methamphetamine" and suggests that his sentence should be recalculated by considering the "D" and "L" components of the DL-methamphetamine separately. Pet. 30. There is no basis for that claim.

The 1987 Guidelines refer to only two types of methamphetamine: "methamphetamine" and "L-methamphetamine." Guidelines § 2D1.1, Drug Equivalency Table (1987). A note to Section 2D1.1 specifies that if a controlled substance is in a mixture or compound, "the entire amount of the mixture or compound shall be considered in measuring the quantity." Guidelines § 2D1.1 n.* (1987). Further, "[i]f a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity." *Ibid.* Thus, the entire weight of a substance containing DL-methamphetamine is properly classified as "methamphetamine," rather than L-methamphetamine, under the 1987 Guidelines. Accord *United*

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[5] After the district court completed its rulings on defense exhibits, petitioner attempted to withdraw his consent to the jury's viewing of the prosecution's exhibits. C.A. App. 64. He offered no reason why the government's exhibits should not be viewed by the jury, however, and the district court overruled the belated objection. *Ibid.*

States v. *Watkins*, 912 F. Supp. 417, 419-420 (E.D. Ark. 1996).

Petitioner relies on cases interpreting later, and significantly different, versions of the Guidelines. As noted above, the 1987 Guidelines sentenced methamphetamine offenders based only on the total weight of a "mixture" containing methamphetamine, without regard to the mixture's purity. Beginning on November 1, 1989, however, the Guidelines were amended to provide different offense levels for "methamphetamine" and "pure methamphetamine" and to instruct: "In the case of a mixture or substance containing * * * methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure * * * methamphetamine, whichever is greater." Guidelines § 2D1.1(c), n.* (1989). In 1991, the term "pure methamphetamine" was replaced by "methamphetamine (actual)." Guidelines § 2D1.1(c), n.* (1991).[6] Those amendments raised the issue of whether, in determining the "purity" of a sample of DL-methamphetamine, the court should measure the relatively inert L component as well as the active D component. The majority of courts that have reached the issue have concluded that "pure methamphetamine" and "methamphetamine (actual)" include DL-methamphetamine, so that a sample of 100% DL-methamphetamine should be considered

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[6] Courts of appeals have concluded that the switch from the term "pure methamphetamine" to "methamphetamine (actual)" was not intended as a substantive change in the Guidelines. *United States* v. *Carroll*, 6 F.3d 735, 744 n.7 (11th Cir. 1993); *United States* v. *Decker*, 55 F.3d 1509, 1511 (10th Cir. 1995).

100% "pure." *United States* v. *Decker*, 55 F.3d 1509, 1511-1513 (10th Cir. 1995); *United States* v. *Carroll*, 6 F.3d 735, 743-747 (11th Cir. 1993); see also *United States* v. *Seyfert*, 67 F.3d 544, 549 (5th Cir. 1995) (Reavley, J., concurring); *Lambert* v. *United States*, 908 F. Supp. 356, 361-362 (W.D. Va. 1995). The Third Circuit, however, has concluded that "the references to methamphetamine and methamphetamine (actual) in the Drug Quantity Tables of U.S.S.G. § 2D1.1(c) refer solely to quantities of D-methamphetamine." *United States* v. *Bogusz*, 43 F.3d 82, 91 (1994), cert. denied, 115 S. Ct. 1812 (1995). That difference in approach has no bearing in this case, because the 1987 Guidelines do not require the court to determine the purity of the DL-methamphetamine petitioner produced, and it is undisputed that the drugs produced contained D-methamphetamine, so that the entire "mixture or compound" was properly considered to be "methamphetamine." Indeed, petitioner cites no case where a court has used anything other than the entire weight of DL-methamphetamine in considering the quantity of "Methamphetamine" under Guidelines § 2D1.1(c).[7] Thus, contrary to petitioner's claim,

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[7] The only allegedly conflicting case that petitioner cites, *United States* v. *Cudemo*, No. 92065301, 1995 WL 639746 at *3, *4 (E.D. Pa. Oct. 30, 1995) (Pet. 24, 25), is entirely consistent with the decision below. In *Cudemo*, the district court, relying on *Bogusz*, concluded that "only the actual amount of d-methamphetamine * * * shall be included within the sentencing guideline definition of '*methamphetamine (actual)*.'" *Id.* at *4 (emphasis added). The court also concluded that the entire weight of a sample of DL-methamphetamine constituted "methamphetamine" within the meaning of Guidelines § 2D1.1(c). *Ibid.*

there is no "confusion" regarding methamphetamine sentencing that has any relevance to his case.[8]

In addition, certiorari is not warranted here because the Sentencing Commission has recently amended the Guidelines by removing the lower penalties for L-methamphetamine from the Drug Equivalency Tables. See United States Sentencing Comm'n, *Federal Guidelines Manual*, App. C, amend. 518, at 817 (Nov. 1, 1995). As a result, L and D-methamphetamine are now treated the same, eliminating any question regarding the proper treatment of DL-methamphetamine.[9] See *United States* v. *Watkins*, 912 F. Supp. 417, 419 n.4 (E.D. Ark. 1996). Thus, any confusion regarding the proper treatment of DL-methamphetamine is of limited future consequence.

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[8] Petitioner's claim that a remand is required to determine the chemical nature of DL-methamphetamine (Pet. 27-29) is similarly misplaced. *United States* v. *Cook*, 49 F.3d 663, 665 (10th Cir. 1995), the case on which petitioner relies, considered whether DL-methamphetamine constituted "pure methamphetamine" under the 1989 version of the Guidelines, an issue not presented here. Moreover, the Tenth Circuit subsequently resolved that question by concluding that DL-methamphetamine does qualify as "methamphetamine (actual)." *Decker*, 55 F.3d at 1511-1513.

[9] There is no merit to petitioner's suggestion (Pet. 21 n.13) that this case involves a circuit conflict over the use of expert testimony in sentencing methamphetamine offenders. Although the Ninth Circuit has concluded that affidavits stating that clandestine labs almost always produce DL or D-methamphetamine are insufficient, standing alone, to show that the drug involved was not L-methamphetamine, *United States* v. *Dudden*, 65 F.3d 1461, 1471 (1995), no court has suggested that the evidence presented here, including a specific analysis of the manufacturing methods used, and testimony regarding the drug's effect, see pp. 4-5 & note 2, *supra*, is likewise insufficient.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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